

Message

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Sent: 7/6/2021 12:41:09 PM
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Subject: Phosphogypsun in Roadbeds reversed -- Inside EPA

Regan Reverses Trump Policy On Radioactive Byproduct Use In Roads

July 2, 2021

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EPA Administrator Michael Regan has rescinded a controversial Trump-era policy that would have allowed the use of phosphogypsum (PG), a radioactive byproduct from fertilizer production, in federal road construction, citing technical flaws in the agency's 2020 approval of a fertilizer industry request to allow such uses of PG.

The move is winning praise from environmentalists, who are challenging the agency's Trump-era policy in federal court and had also filed an administrative petition for reconsideration.

"This is great news at a time when we could all use some," Brooks Armstrong, president of People for Protecting Peace River, one of the litigants seeking reversal of the policy, said. "We will continue in our effort to make known the dangers of phosphogypsum and its continued production," she added in a press release from Center for Biological Diversity (CBD), which has led the lawsuit against the policy.

"Allowing phosphogypsum in roads was a boneheaded, short-sighted favor to the industry," Jaclyn Lopez, CBD's Florida director, said in the release. "While the withdrawal cites technical deficiencies in the applicant's petition, this action is consistent with 30 years of science showing that phosphogypsum poses a substantial risk to humans and the environment."

In a detailed June 30 letter to The Fertilizer Institute (TFI) -- the industry group that sought permission for use of PG in roads -- Regan reverses the policy, effective immediately, citing technical flaws in former Administrator Andrew Wheeler's approval related to a lack of information provided by TFI.

EPA "is withdrawing, revoking and rescinding its October 2020 conditional approval of the broad, generalized request to use PG in road construction," he says in the letter.

At the same time, he notes his decision does not prevent a future "proper request" under Clean Air Act (CAA) regulations "for approval of the use of PG for other purposes that contains the information required by" CAA regulations.

In a pre-publication Federal Register notice that Regan signed June 30, the agency reviewed the October decision, noting both environmentalists petitioned for the review and the Biden administration was prompted to revisit the policy under its Trump-era policy review called for by Executive Order 13990.

Its review prompted EPA to determine "that the approval was premature and should be withdrawn because the request did not contain all of the required information" per EPA's CAA regulations, the notice says.

At issue was Wheeler's conditional approval in October 2020 of a request by The Fertilizer Institute on behalf of its members that own or operate PG stacks to authorize use of PG, which contains the radioactive elements uranium and radium, in certain government road construction projects, reversing a decades-long bar on the use of PG in road construction.

Although Wheeler's decision generally approved use of the material in government road projects, it also required certain conditions be met, including limits on the average radioactivity content of the material and future use restrictions for the roadbed.

1992 Decision

Wheeler's action reversed a 1992 EPA decision barring the use of PG in road construction. Instead, Wheeler's policy agreed with the fertilizer industry that the risks of using PG in road construction are equivalent to the protections provided if PG is maintained in stacks, as required under CAA rules.

EPA for decades has required the fertilizer industry to store PG in large piles, called stacks, and has limited the level of radon that can be emitted from the stacks, CBD says. CBD argues that if dispersed, PG would result in an “unreasonable public health threat stemming from appreciable quantities” of radium-226, uranium, radon, lead and other harmful substances.

CBD and other groups had sued EPA last December in order to reverse the policy. The U.S. Court of Appeals for the District of Columbia Circuit has granted EPA’s requests for stays of the case, *CBD, et al. v. EPA, et al.*, while it reconsidered Wheeler’s policy.

CBD and other groups are also concerned about environmental releases from the stacks, and recently sued the state of Florida and the operator of one of the stacks over discharges of millions of gallons of contaminated wastewater into Tampa Bay.

In his letter to TFI, Regan details the deficiencies with EPA’s approval and TFI’s submittal -- specifically the lack of information provided by TFI. He notes that EPA “has long emphasized that the proper request under [Clean Air Act PG regulations known as 40 Code of Federal Regulations, section 61.206] must include all of the information specified in [Section] 61.206(b).” Section 61.206 bars the removal of PG from stacks for other uses, except certain specified allowances, without prior EPA approval.

He says while EPA in its October 2020 decision conceded that TFI’s request lacked all the information required by section 61.206(b), it argued that the missing data “was ‘not essential to making the determination of whether the proposed use of PG would be at least as protective of public health as stacking.’”

But, Regan says, this statement is “not germane to the review process,” and notes that such requests must contain certain required information. Even if all required information is not critical for a risk assessment, “the information is a required component of a proper, complete request, and may be useful or important in other ways or may otherwise serve interests associated with consideration of a request for approval of the use of PG.”

The information that was lacking in the request, which is undisputed, included “a great deal of information required by the regulation,” such as the physical location of each facility where use and handling of PG would take place, the quantity of PG to be used by each facility, a signed request from corporate officers of each facility, the letter says. It also questions whether TFI’s request included sufficient information on measures that would be taken to prevent an uncontrolled release of PG, among other issues.

EPA finds “it cannot reasonably be contended that the request substantially complied with the requirements of [section] 61.206(b),” the letter says.

The agency “recognizes that at minimum the prior administration erred in its approval by not following its own rules regarding required information, and that there is no implicit sequencing toward approval based on an applicant’s request,” Craig Diamond, vice chair of Sierra Club Florida chapter executive committee, said in the CBD release. “Further, the EPA affirmed it has authority to pre-approve only select applications of phosphogypsum and road construction is not among those.” -- *Suzanne Yohannan* (syohannan@iwpnews.com)
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